



U.S. Citizenship
and Immigration
Services

BL

PUBLIC COPY

FILE: EAC 01 081 52493 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:

JAN 22 2004

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

identifiers provided to
prevent disclosure of
invasion of personal privacy

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a floor specialist. It seeks to employ the beneficiary permanently in the United States as a floor layer. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. For this case, the petition's priority date is January 14, 1998. The beneficiary's salary as stated on the labor certification is \$15.50 per hour or \$32,240.00 per annum.

With the petitioner's initial visa petition, the petitioner's former counsel submitted a copy of the beneficiary's W-2 Wage and Tax Statement which showed he was paid \$8,670.28 in 1998 and \$21,258 in 2000, as well as copies of the petitioner's 1998 and 2000 Forms 1120S U.S. Income Tax Returns for an S Corporation. The petitioner's tax return for calendar year 1998 reflected gross receipts of \$262,876; gross profit of \$262,876; compensation of officers of \$70,489; salaries and wages paid of \$72,985; and an ordinary income (loss) from trade or business activities of \$655. The tax return for calendar year 2000 reflected gross receipts of \$296,805; gross profit of \$296,805; compensation of officers of \$56,252; salaries and wages paid of \$127,696; and an ordinary income (loss) from trade or business activities of \$18,978. Both the 1998 and 2000 tax returns indicated that the petitioner's current liabilities exceeded the petitioner's current assets.

Because the evidence submitted was insufficient for the director to determine whether or not the petitioner had the continuing ability to pay the proffered wage, a request for evidence was submitted on September 20, 2001. The director sought evidence concerning the petitioner's ability to pay the proffered wages as of January 14, 2000.¹

¹ The petitioner's former counsel indicated that the Department of Labor (DOL) mistakenly put January 14, 2000 as the date the alien labor certification application was filed with their local office establishing the priority date. DOL subsequently issued a new certified labor certification application with the corrected date of January 14, 1998 as the date the application was filed with their local office establishing the priority date.

In response to the director's request for evidence, counsel corrected the priority date and relied upon the petitioner's 1998 and 2000 tax returns already in the record of proceeding. An additional document was also submitted, titled "Proof of Ability to Pay Proffered Wage," and stated the following:

Since subject application was submitted in 1998, [the petitioner] is submitting 1998 Federal Tax Returns for an S-Corporation that reflects [sic] a gross Income in excess of \$260,000. Although the net income for 1998, [sic] was only \$655, the 100% owner of the S-Corporation took home over \$70,000 (See Line 7, compensation of officers).

The proffered wage was \$32,240, of which \$8,670 was already paid to alien in 1998 (See W-2 attached), thus leaving a possible shortfall of only \$23,570 if the alien was converted to full-time work – as he will be upon issuance of permanent residence. But, the actual net of \$70,000 will easily accommodate that shortfall, without significantly impairing petitioner's financial status – especially since the additional staff will significantly improve the overall income and profitability of the business.

The author of this summary implies that the petitioner's owner will forego compensation in the future or could have in the past to accommodate the amount of salary to be paid to the beneficiary. However, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage because the petitioner's owner's wages were already expenses paid out and could not be used as income to pay proffered wages, and denied the petition accordingly.

On appeal, counsel submits another copy of the petitioner's 1998 tax return and reiterates his assertion that the petitioner could have paid the salary from his profit from the company. Counsel's assertion is not persuasive. The petitioning entity in this case is a corporation. Consequently, any assets of the individual stockholders including ownership of shares in other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by both CIS and judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). The director is correct in analyzing the petitioner's net income after expenses. Thus, the expenses already paid out, such as the amount of money the petitioner's owner was paid in the past and seeks to forego in the future to enable the petitioner to pay the proffered wages, cannot be considered.

The petitioner's Form 1120S for calendar year 1998 shows an ordinary income of \$655. The petitioner could not pay a proffered salary of \$32,240.00 out of this income. Even if CIS takes into consideration the wage already paid of \$8,670.28, the ordinary income is still insufficient to pay the wage offered. Additionally, the petitioner's

current liabilities exceed the petitioner's current assets resulting in negative net current assets. Thus, the petitioner also could not pay the proffered salary out of its net current assets.²

The petitioner's 2000 federal tax return shows an inability to pay the wage offered. The petitioner's Form 1120S for calendar year 2000 shows an ordinary income of \$18,978. The petitioner could not pay a proffered salary of \$32,240.00 out of this income. However, if CIS takes into consideration the wage already paid to the beneficiary of \$21,258, the ordinary income is sufficient to pay the remaining wages for the year 2000. Thus, the petitioner could pay the proffered wages in the year 2000.

Beyond the decision of the director, the petitioner has failed to submit any evidence concerning its ability to pay the proffered wages for the year 1999. The petitioner's former counsel conceded that the priority date was established on January 14, 1998. Thus, the petitioner must also prove its ability to pay the proffered wages in 1999 to show an ongoing ability to pay the proffered wages.

Accordingly, after a review of the federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing to present. Although the petitioner has established it can pay the proffered wages for the year 2000, it failed to establish its ability to pay the proffered wages for the years 1998 and 1999.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition is denied.

² Net current assets are assets that can reasonably be expected to be converted to cash or a cash equivalent within the year less any financial encumbrances on the assets. Thus, CIS will examine net current assets to determine if the petitioner has the ability to pay the proffered wages from the petitioner's net current assets. The net current assets would have to be greater than the proffered wage in order to evidence the ability to pay.